United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2610

To be argued by
RICHARD WILE

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2610

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES HENRY ROLLINS, a/k/a "Lee Evans,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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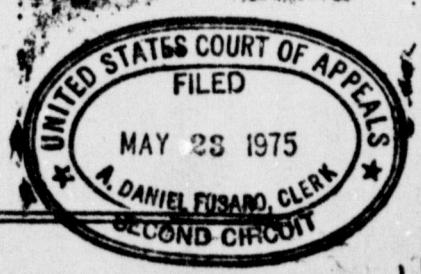

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Preliminary Statement

James Henry Rollins appeals from a judgment of conviction entered on December 11, 1974 in the United States District Court for the Southern District of New York, after a three day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment S 74 Cr. 951, filed on October 10, 1974, charged Rollins in Counts One and Two with aiding and abetting mail fraud, in violation of Title 18, United States Code, Sections 1341 and 2, in Count Three with using a false name to promote mail fraud, in violation of Title 18, United States Code, Section 1342, and in Count Four with entering a bank with intent to commit a larceny, in violation of Title 18, United States Code, Section 2113(a).*

* Indictment S 74 Cr. 951 superseded Indictment 74 Cr. 877, filed on September 16, 1974. Indictment 74 Cr. 877 only charged Rollins, under the name "Robert Cody," with two counts of mail fraud, in violation of Title 18, United States Code, Section 1341. A *nolle prosequi* was filed as to Indictment 74 Cr. 877 on December 19, 1974.

Trial commenced on October 22, 1974 and concluded on October 24, 1974 when the jury returned guilty verdicts on Counts One and Two.* Rollins was sentenced to concurrent three and one-half year terms of imprisonment, which he is currently serving, and a $1,000 committed fine was imposed on each count.

Statement of Facts

The Government's Case

The Government's proof at trial established that Rollins and a former employee of a bank in Nairobi, Kenya participated in a scheme to defraud a bank in New York of more than $650,000 by means of cleverly forged payment orders mailed from Kenya to the United States. The evidence amply supported the Government's theory that Rollins' Kenyan confederate forged and mailed the payment orders while Rollins established a bank account in New York under the name of a fictitious business enterprise and endeavored to expedite the payment of the proceeds of the scheme into that account.

On August 10, 1973 Rollins, claiming to be "Robert Cody," opened a checking account in the name of "Kodi's Domestic & International Enterprises" at the branch of Manufacturers Hanover Trust Company ("Manufacturers

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* After the jury returned guilty verdicts on Counts One and Two, the Government consented to a mistrial on Count Three; Count Three was dismissed by Judge Cannella on December 11, 1974 upon Rollins' motion and with the Government's consent. Judge Cannella dismissed Count Four on October 24, 1974, without submitting it to the jury, on the ground that, as a matter of law, Title 18, United States Code, Section 2113(a) was not intended to encompass an entry into a bank with the intent to perpetrate mail fraud.

Hanover") located at 37 Avenue B, New York, New York ("Avenue B branch") (Tr. 64-65).*

In late August or early September, 1974, approximately four or five days apart, two mail transfer forms, GXs 1A and 2A, stapled to air mail envelopes, GXs 1B and 2B, were received from his secretary by Joseph Portale, the officer-in-charge of the Avenue B branch (Tr. 53, 55-59, 61). The procedure of the Avenue B branch at the time was for the postman to leave the mail on the secretary's desk and for the secretary to open mail not addressed to a specific person, staple the envelope to its contents and deliver them to Portale (Tr. 56-57).

The two envelopes were addressed to "The Manager, Manufacturers Hanover Trust Company, 37 Avenue B, New York, New York 10009, U.S.A.," and bore Nairobi, Kenya postmarks. Affixed to the envelopes were cancelled Kenyan postage stamps. GX 1B was postmarked at Nairobi, Kenya on August 21, 1974 and GX 2B was postmarked at Nairobi, Kenya on August 30, 1974.

The two mail transfer forms, GX 1A, dated August 21, 1974, and GX 2A, dated August 26, 1974, purported to be directions from the Standard Bank Limited branch on Kenyatta Avenue, Nairobi, Kenya to the Avenue B branch to deposit $301,097.48 and $352,165.03 respectively into the account of "KODI'S DOMESTIC & INTERNATIONAL ENTERPRISES." The two transfer forms listed the drawer, *i.e.*, the owner of the account with Standard Bank Limited from which the money supposedly was to be transferred, as "WHEAT MARKETING BOARD," for which there was no listing in the Kenya Post Office Directory, GX 10 (Tr. 142-45, 159-60, 162). The two transfer forms

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* "Tr." refers to the trial transcript. "GX" refers to Government's exhibit in evidence. "DX" refers to Rollins' exhibit in evidence. "App." refers to Rollins' appendix.

bore the forged signatures of Giles A. F. Noronha, the officer-in-charge of the Foreign Exchange Department of the Standard Bank Limited Government Road branch, and of Neville D. Cassime, the officer-in-charge of the Foreign Exchange Department of the Standard Bank Limited Kenyatta Avenue branch (GXs 3 and 4; DXs A and B; Tr. 137-39, 163-64). Adjacent to the forged signatures of Noronha and Cassime were the correct "reference numbers" for those individuals (Tr. 139-40, 164).* Finally, the two transfer forms bore, in the appropriate places, the correct branch number of the Standard Bank Limited Kenyatta Avenue branch (Tr. 164-65).

Portale caused the mail transfer forms to be delivered to the International Department of Manufacturers Hanover's main office (Tr. 57, 60).

Joseph Meehan, Assistant Vice President of Manufacturers Hanover in charge of special services and security for the International Department, received the first mail transfer form, GX 1A, on September 3, 1974 (Tr. 94). Mr. Meehan verified the account name and number on the form with the Avenue B branch and obtained the telephone number for the account (Tr. 94-95). Meehan called that number and spoke with a person who identified himself as "Robert Cody" (Tr. 95). "Cody" said he was expecting a transfer of a substantial amount of money from Kenya (*id.*).

On September 4, 1974 "Cody" called Meehan and asked if the transfer form was in the process of being honored; Meehan answered that the process had begun (Tr. 96-97).

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* The "reference numbers" are numbers assigned to the officers of Standard Bank Limited with authority to sign bank documents, which numbers are published, together with copies of the officers' signatures, in a "reference book" distributed to all branches of Standard Bank Limited and to all banks with which Standard Bank Limited maintains a banking relationship (Tr. 139-40).

"Cody" said that he was anxious to be paid for shipments of wheat he had made to Kenya, where there had been a drought, and that he was expecting two additional payments (Tr. 97).

A "toll statement," GX 12, of the New York Telephone Company reflected that, at 4:00 P.M. on September 4, 1974, a telephone call was made to Kenya from the number listed to "Robert R. Cody" on the Avenue B branch's average balance card, GX 11D, for the "Kodi's Domestic & International Enterprises" checking account (Tr. 69-70, 198-201).

"Cody" called Meehan again the next day (Tr. 97). Again "Cody" said he was anxious to receive payment and Meehan told him it was "in the works" (Tr. 97-98). Meehan told "Cody" that the second transfer form, GX 2A, had arrived and "Cody" said he was expecting a third (Tr. 98). Meehan told "Cody" that the International Department was behind in processing payments and that Meehan would try to expedite the matter (*id.*).

On September 6, 1974 Meehan met with Postal Inspector John Slavinski (Tr. 98, 114). During the meeting a secretary told Meehan that "Mr. Cody is on the phone" (*id.*). Slavinski said he would listen to the call and instructed Meehan to inform "Cody" that the proceeds of the transfer forms would be in his account on the morning of Monday, September 9, 1974 (Tr. 99, 114). With Slavinski listening on another extension, Meehan told "Cody" that the processing of the transfer forms would be completed over the weekend, after which the money would be available to him at the Avenue B branch (Tr. 99-100, 114-16). "Cody" said he would go to the Avenue B branch on Monday morning (Tr. 100, 115).

Rollins entered the Avenue B branch at approximately 9:45 A.M. on September 9, 1974 (Tr. 72, 116). Roseanne Santaromita, the Operations Supervisor who had opened

the "Kodi's Domestic and International Enterprises" checking account for Rollins, approached him and took him to her desk (*id.*). Slavinski was seated at an adjacent desk (Tr. 116). Santaromita showed the transfer forms, GXs 1A and 2A, to Rollins and asked him if he knew they had arrived; Rollins said he did (*id.*). Santaromita asked Rollins what the transfer forms were in payment of, and Rollins said they were for a wheat transaction on the Nairobi, Kenya commodities market (*id.*). Slavinski then arrested Rollins (*id.*).

When arrested, Rollins had in his possession a slip of paper, GX 8, on which were Meehan's name and telephone number (Tr. 117-19). Also in Rollins' possession at that time was a personal address book, GX 9, an entry in which was, opposite "name," "Mr. Zini," opposite "address," "P.O. Box 48976," opposite "City," "N.K." and opposite "telephone," "556101" (Tr. 119-20). The Post Office Directory for Kenya, GX 10, disclosed that post office box 48976 in Nairobi, Kenya was rented by "Obado Ooko" (Tr. 142, 148-50).* Walter Donald Obado Ooko was an employee of the Foreign Exchange Department of the Government Road Branch of Standard Bank Limited, Nairobi, Kenya, who had been dismissed during 1973 (Tr. 147-48).

After his arrest Rollins was taken to Room 115 of the United States Courthouse for the Southern District of New York, the hearing room for the United States Magistrates

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* There is no home delivery of mail in Kenya (Tr. 142-43). Consequently, in order to receive mail in Kenya, a person must rent a post office box (Tr. 143). Because mail must be addressed to a person's post office box, the East African Posts and Telecommunications Corporation publishes the Post Office Directory, GX 10, which, like a telephone directory, is distributed to every organization and post office box renter in Kenya (*id.*). The Post Office Directory is relied upon by the entire public in Kenya in order to send mail (*id.*).

(Tr. 234). Slavinski returned Rollins' personal address book, GX 9, to him (Tr. 236-37). Rollins then gave Deborah Miles, whom, during summation, Rollins claimed was his wife, several telephone numbers from GX 9, including the number listed for "Mr. Zini," and instructed her "to get in touch with these people and let them know what happened" (Tr. 237-38, 271).

The fingerprints of James Rollins, GX 13B, were, in the opinion of Donald Mooney, a fingerprint expert employed by the Postal Inspection Service Identification Bureau, the same as the fingerprints of appellant, GX 13A, taken after his arrest and signed by him "R. Cody" (Tr. 120-21, 201-05).

From 1965 to 1967 Rollins was a student at the University of Missouri School of Law in Columbia, Missouri (Tr. 171-72). Rollins was still living in Columbia, Missouri when another student, Lynwood Evans, was attending the University of Missouri School of Law from 1967 to 1969 (Tr. 172-73).

In September, 1971 Rollins, under the name "Lee Evans," lived with Deborah Miles at 9917 99th Avenue Court, Oakland, California (Tr. 180-83, 186-87). On September 24, 1971 Sergeant Fred Farkas of the Oakland Police Department executed a search warrant for those premises (Tr. 188-89). During that search two United States passports, GXs 5A and 6A, were seized (Tr. 189, 191-92). GX 5A was issued to James Henry Rollins. GX 6A, issued to "Lynwood Joseph Evans" and to which was affixed a photograph of Rollins, bore travel stamps indicating that Rollins had been in Kenya during July and August, 1971. In the opinion of Thomas Donovan, a handwriting expert employed at the Postal Inspection Service Laboratory in Washington, D.C., the applications, GXs 5B and 6B, submitted to the State Department for the issuance of those passports were written by Rollins, who had pro-

vided handwriting exemplars, GX 7A, on October 11, 1974 (Tr. 216-21).

The Defense Case

Rollins did not testify in his own behalf.*

Wendell Rachell, the acting superintendent of the building at 222 East Seventh Street, New York, New York, testified that Rollins had lived at that address, under the name "Robert Cody," during 1973 and 1974 (Tr. 246-47). Rachell also testified that in May, 1974 Rollins, George Fountain and James Morrell started a shirt tie-dyeing business known as Fandango Designs in a workshop in the basement of that building (Tr. 250-52). On cross-examination Rachell testified he had never heard of "Kodi's Domestic & International Enterprises" (Tr. 253).

George Fountain also testified that he, Rollins and Morrell had incorporated Fandango Designs, which had its workshop at 222 East Seventh Street (Tr. 257). Fountain explained that Rollins had given advice with respect to the incorporation of Fandango Designs and the establishment of its financial records (Tr. 258). Fountain testified that he was aware of "Kodi's Domestic & International Enterprises" because its bank account and credit rating were used by Fandango Designs (Tr. 256, 259, 261-63). On cross-examination Fountain recalled being questioned by Slavinski on September 14, 1974, but could not remember whether he had denied ever having heard of "Kodi's Domestic & International Enterprises" (Tr. 260-61). Fountain

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* Although Rollins did not take the witness stand and subject himself to cross-examination, he managed to provide the jury with an unsworn narrative of his version of the facts during his opening statement (Tr. 33-45). No testimonial or documentary proof was thereafter offered to support substantial portions of this statement.

admitted that all he knew about the business of "Kodi's Domestic & International Enterprises" was that it had a bank account (Tr. 261-62).

ARGUMENT

POINT I

The District Court properly denied Rollins' motion to suppress the passports seized by the Oakland, California Police Department in 1971.

Rollins contends that Judge Cannella erroneously admitted into evidence the two passports, GXs 5A and 6A, seized pursuant to search warrant by Sergeant Fred Farkas of the Oakland, California Police Department because the affidavit in support of the search warrant did not establish probable cause for the issuance of the warrant, because the warrant did not authorize the seizure of passports, and because the Government did not produce signed copies of the warrant and supporting affidavit. These contentions are without merit.

A. Probable cause.

Rollins asserts that the sufficiency of the affidavit supporting the search warrant must be determined in accordance with the standards enunciated in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969). It is undisputed that the information provided by Ronald Williams to Sergeant Conrad Blevins is sufficient to establish probable cause that Rollins murdered Isaac Lewis and Isaac Green and that the murder weapon was in Rollins' apartment if the judicial officer who issued the warrant had a "substantial basis" for crediting that hearsay. *United States* v. *Harris*, 403 U.S. 573, 581 (1971).

The decisive factor in assessing the affidavit is that Ronald Williams is an identified eyewitness whose address

is provided, rather than an anonymous professional informant. This Court's recent opinion in *United States* v. *Burke*, Dkt. No. 75-1021 (2d Cir., May 15, 1975), slip op. 3571 is persuasive authority for the proposition that *Aguilar* v. *Texas, supra*, and *Spinelli* v. *United States, supra*, are not applicable "where the information comes from an alleged victim of or witness to a crime." *United States* v. *Burke, supra*, at 3575. In *Burke* this Court agreed with the conclusion reached in a substantial number of federal * and state ** cases that victim and bystander eyewitnesses, who generally do not expect any concession from law enforcement authorities in exchange for their information, are inherently reliable because their actions are motivated by concern for the safety of themselves and society. *See also United States* v. *Miley*, Dkt. No. 74-2207 (2d Cir., March 19, 1975), slip op. 2363 at 2384. *Burke* is squarely applicable to the present case and requires that the validity of the warrant be sustained.

Even under the *Aguilar-Spinelli* analysis the affidavit here is more than adequate. Briefly stated, the require-

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* *Cundiff* v. *United States*, 501 F.2d 188, 189-90 (8th Cir. 1974); *United States* v. *McCoy*, 478 F.2d 176, 179 (10th Cir.), *cert. denied*, 414 U.S. 828 (1973); *United States* v. *Unger*, 469 F.2d 1283, 1287 n.4 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); *United States* v. *Bell*, 457 F.2d 1231, 1238-39 (5th Cir. 1972); *United States* v. *Mahler*, 442 F.2d 1172, 1174-75 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); *McCreary* v. *Sigler*, 406 F.2d 1264, 1269 (8th Cir.), *cert. denied*, 395 U.S. 984 (1969); *Coyne* v. *Watson*, 282 F. Supp. 235, 237 (S.D. Ohio 1967), *aff'd*, 392 F.2d 585 (6th Cir. 1968).

** *New Jersey* v. *Kurland*, 130 N.J. Super. 110, 325 A.2d 714, 716-17 (App. Div. 1974); *Iowa* v. *Drake*, 224 N.W. 2d 476, 478-79 (Iowa 1974); *Erickson* v. *Alaska*, 507 P.2d 508, 517-19 (Alas. 1973); *Guzewicz* v. *Virginia*, 212 Va. 730, 187 S.E. 2d 144, 148 (1972); *Utah* v. *Treadway*, 28 Utah 2d 160, 499 P.2d 846, 848 (1972); *Kansas* v. *Lamb*, 209 Kan. 452, 497 P.2d 275, 286 (1972); *Colorado* v. *Glaubman*, 175 Colo. 141, 485 P.2d 711, 716-17 (1971) (*en banc*); *Wisconsin* v. *Paszek*, 50 Wis. 2d 619, 184 N.W. 2d 836, 842-43 (1971); *Illinois* v. *Hoffman*, 45 Ill. 2d 221, 258 N.E. 2d 326, 328, *cert. denied*, 400 U.S. 904 (1970); *California* v. *Bevins*, 6 Cal. App. 3d 421, 425-26, 85 Cal. Rptr. 876, 879-80 (Ct. App. 1970).

ments are that a supporting affidavit must show (1) that the informer was in fact a reliable person, and (2) that the underlying circumstances by which he obtained the information were such that the information was probably accurate. *United States* v. *Canieso,* 470 F.2d 1224 (2d Cir. 1972); *United States* v. *Anderson,* 500 F.2d 1311, 1315 (5th Cir. 1974). It is undisputed that, if the reliability of Ronald Williams appears from the supporting affidavit, Williams' information was obtained in a reliable manner, *i.e.,* personal observation. Moreover, it is conceded that hearsay from an untested informant may be validated by corroborative independent investigation by the police. *United States* v. *Harris, supra,* 403 U.S. at 581-82.

In this case the information provided by the informant Williams was amply corroborated. Officer Blevins was told by Williams that: (1) he heard shots coming from the direction of the office of the Garden Manor Square Apartments; (2) he knew "Lee J. Evans;" (3) he knew that "Lee J. Evans" lived in an apartment on 99th Avenue Court; and (4) upon hearing the shots he saw "Lee J. Evans," carrying a brief case, run from the office in the direction of his apartment. Williams' statement that he heard shots coming from the direction of the office of the Garden Manor Square Apartments was corroborated by Officer Blevins' personal observations in that office of the bodies of Lewis and Green in a pool of blood and of eight empty 9 mm. shell casings. Williams' statements that he knew "Lee J. Evans" and that "Evans" lived in an apartment on 99th Avenue Court was corroborated by the independent evidence gathered by Blevins from the Pacific Telephone and Telegraph Company and from Willie Hale, a maintenance man at the Garden Manor Square Apartments.

Rollins seeks to discount the substantial corroboration of Williams' information by erecting, without authority, the requirement that corroboration must directly link the suspect to the commission of the crime. Such is not the law.

In *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972), this Court stated:

> ". . . An untested informant's story may be corroborated by other facts that become known to the affiant, even if they corroborate only innocent aspects of the story."

In addition to the independent corroboration of Williams' information, other indicia of reliability entitled the California judge issuing the warrant to conclude that Williams was a reliable person. First, Williams' statement that Evans was carrying a brief case as he ran from the scene of the murders was a convincing detail. *See United States* v. *Dzialak*, 441 F.2d 212, 216 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971). Second, Williams made the statement that he personally knew "Lee J. Evans." This assertion was substantially corroborated by Blevins' investigation which established that Williams had been correct when he said that "Evans" lived on 99th Avenue Court. The existence of a relationship between an informant and a suspect has been held to be a significant factor in justifying a finding of the informant's reliability. *See United States* v. *Sultan*, *supra*, 463 F.2d at 1069 (defendant's cousin); *Ignacio* v. *Territory of Guam*, 413 F.2d 513, 519 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970) (defendant's neighbor); *Parker* v. *United States*, 407 F.2d 540, 542 (9th Cir. 1969) (defendant's daughter). *See also United States* v. *Miley*, *supra*.

The Supreme Court has held that an affidavit is to be interpreted in a "common sense," not a hypertechnical manner, and even in a close case, which the Government submits this is not, doubt should be resolved in favor of sustaining the warrant. *United States* v. *Harris*, *supra*, 403 U.S. at 577; *United States* v. *Ventresca*, 380 U.S. 102, 109 (1965). The application of those principles requires that the California search warrant be upheld as supported by an affidavit establishing probable cause. *United States* v. *Harris*, *supra*; *Jones* v. *United States*, 362 U.S. 257 (1960).

B. Scope of the warrant.

Rollins' claim that the seizure of the passports was beyond the scope of the search authorized by the warrant was waived. This claim was *first* mentioned by appellant in a *post-trial motion* dated December 11, 1974, which stated:

> "ROBERT R. CODY, defendant moves that the Court, with respect to the seizure of the two (2) passports, make a part of the record in this case for appeal, the affidavit, search warrant and return thereof, in that I am going to contest said search and seizure because it exceeded the authority as stated in the search warrant as to what could be searched and seized.
>
> "Specifically there was no direction for seizure of the passports.
>
> "Defendant further moves that the Court reconsider its decision on allowing the two (2) passports into evidence over the objections of the defendant, grant a rehearing on the motion to suppress/or in the alternative, a new trial."

A motion to suppress evidence pursuant to Rule 41(f) of the Federal Rules of Criminal Procedure must, unless otherwise justified, be made before trial. *United States* v. *Mauro*, 507 F.2d 802, 805-07 (2d Cir. 1974). The failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on that ground. *See United States* v. *Sisca*, 503 F.2d 1337, 1346-49 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3281 (1974); *United States* v. *Bryant*, 480 F.2d 785 (2d Cir. 1973).

It is clear that Rollins' failure to move prior to trial to suppress the passports on the ground that their seizure was not within the scope of the warrant was not justifiable. Although the record is somewhat ambiguous because Rol-

lins made no pre-trial discovery motions, informal pre-trial discovery, during which the Government's intention to offer the passports into evidence was disclosed, was conducted with Edward S. Panzer, Esq., the experienced and able attorney assigned by Judge Cannella to assist and advise Rollins in his conduct of the trial. That fact appears clearly from the circumstance that, immediately prior to trial and without any statement by the Government on the subject, Rollins requested that the Government provide copies of the warrant and supporting affidavit to Judge Cannella for his determination of probable cause (Tr. 5). Nor can the absence of a pre-trial motion to suppress the passports because the scope of the warrant was exceeded be excused on the ground that Rollins acted as his own attorney. Rollins conducted the trial *pro se* in the face of strong admonitions by Judge Cannella as to the dangers of that course. Moreover, Rollins was provided with counsel to advise and assist him, first Larry Greenberg, Esq. of the Legal Aid Society and second Mr. Panzer.

Even if not waived, Rollins' contention with regard to the scope of the actual search by the Oakland Police Department cannot be sustained. In *Coolidge* v. *New Hampshire,* 403 U.S. 443, 466 (1971), the Supreme Court stated:

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object . . .—and permits the warrantless seizure."

Of course, since Rollins did not make this claim prior to trial, the record is scanty as to the conduct of the search. Nevertheless, it is clear that the Oakland Police Department was searching for a 9 mm. pistol and ammunition, which might easily have been in the drawers where, accord-

ing to the inventory of items seized (App. E), the passports were found.

However, Rollins contends that this question should be governed by the prohibition of *Marron* v. *United States*, 275 U.S. 192 (1927), against "general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 467. As this Court observed in *United States* v. *Pacelli*, 470 F.2d 67, 71 n.6 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973):

> "Both United States v. LaVallee and United States v. Dzialak cite Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) for the proposition that items not specified in a search warrant may not be seized under its authority.
>
> "The Supreme Court's decision in *Coolidge* casts doubt upon the continuing validity of such reliance."

The plurality opinion in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 469-70 n. 26, regards *Marron* v. *United States*, *supra*, as supporting only the "inadvertence" requirement of the "plain view" doctrine. Moreover, in the present case, the police did not continue to search after they found the objects for which the search warrant was authorized. The Oakland Police Department never did find the 9 mm. pistol with which Lewis and Green had been murdered, a fact which justifies the complete, thorough search of Rollins' apartment.

This Court, of course, could notice the alleged error if the admission of the seized passports constituted "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. *See United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). This case is plainly inappropriate for such consideration.

> "The power to notice plain error is one that we exercise only where the fundamental fairness of the

> trial is affected. Only if serious injustice was inflicted upon a defendant, or if he was convicted in a manner inconsistent with fairness and integrity of judicial proceedings, will we exercise our power under the plain error rule. . . ." *United States* v. *Bryant, supra,* 480 F.2d at 789-90 n. 3 (citations omitted).

In this case, while the passports seized in California were useful in establishing Rollins' true identity and contacts in Kenya, they were hardly the linchpin of the Government's case. Rollins' identity was otherwise established amply by eyewitness identification and fingerprints. Rollins' direct contacts in Kenya were also proved by the names and addresses in Rollins' personal address book, GX 9, by the toll statement, GX 12, disclosing a call from Rollins' telephone to Kenya on September 4, 1974 and by the fact that the transfer forms from Kenya contained the name and number of Rollins' checking account. Nor is there much basis for the speculation as to the allegedly devastatingly prejudicial effect of the introduction of the passports. Despite the fact that both Rollins and Mr. Panzer knew from the "3500 material" the answer to the question that elicited the testimony that in 1971 a search warrant was executed for Rollins' Oakland apartment, neither objected to the question. The Government did not use the passports to prove that Rollins was a forger, since the entire theory of the Government's case was that Rollins' confederate in Kenya forged and mailed the transfer forms. Finally, applying for and using a passport issued to a person using an assumed name are hardly the kinds of criminal activity that would seem likely to inflame, or even occur to, the average juror. In any event, the prosecution never once even suggested that the jury should consider the passports as proof of other crimes.

C. Unexecuted copy of affidavit.

As discussed above, Rollins moved on the morning of the trial to suppress the passports. At that time Rollins only requested that Judge Cannella review the supporting affidavit for the warrant for the purpose of determining whether the affidavit established probable cause. The Government produced an unexecuted carbon copy of the affidavit and a photocopy of the executed warrant, DX 1. Rollins now argues, somewhat ambiguously and completely without authority, for reversal for the first time on the ground that the Government failed to produce the original warrant and affidavit (or presumably certified and exemplified copies) or perhaps a photocopy of the original executed affidavit. The argument cannot prevail.

First, Rollins' unjustified and unexplained failure to raise the issue below at any time constitutes a waiver of the claim of error on appeal. *See* Point II B, *supra*. It is also clear that the question is unworthy of the exercise of this Court's power under the "plain error" rule. In this case, had the question of the alleged inadequacy of the copies of the warrant and affidavit produced by the Government been raised below, it would have been a relatively uncomplicated matter for the Government to have secured appropriate copies. Moreover, on this appeal Rollins neither asserts that the warrant or the affidavit was not signed by the appropriate person nor that the original warrant and affidavit differed substantively from the copies produced by the Government.

More important, however, is that it was not error at all for the Government not to have been required to produce the original warrant and affidavit. A defendant moving to suppress evidence bears the burdens of going forward and of proving an illegal search. *United States* v. *Masterson*, 383 F.2d 610, 614 (2d Cir. 1967), *cert. denied*, 390 U.S. 954 (1968). *See* 8A *Moore's Federal Practice* ¶ 41.08[4] at 41-92 (2d ed. 1975); 3 Wright, *Federal Practice and Proce-*

dure: *Criminal* § 675 at 126-27 (1969). The burden of proof shifts to the Government when the movant establishes that the search was not pursuant to warrant. 8A *Moore's Federal Practice, supra,* at 41-92; 3 Wright, *Federal Practice and Procedure*: *Criminal, supra,* at 127; 5 Orfield, *Criminal Procedure Under the Federal Rules* § 41.54, text accompanying n. 13.5 at 140 (Supp. 1974). In this case Rollins did not claim that the search during which the passports were found was conducted without a warrant. Consequently, Rollins had the burden of proving that the warrant was defective because of an unsworn supporting affidavit. Obviously, Rollins had no reason to believe that was the case and made no such claim. And just as obviously Judge Cannella did not err by inspecting an unexecuted copy of the affidavit. In *United States* v. *Thompson,* 421 F.2d 373 (5th Cir.), *vacated on other grounds,* 400 U.S. 17 (1970), the defendant claimed that the denial of his suppression motion, after a hearing, constituted reversible error because a questioned search warrant was not placed into evidence, thereby depriving him of the opportunity to determine whether the warrant existed and was issued and executed properly. This case differs from *United States* v. *Thompson, supra,* in that Rollins did not request a hearing concerning the search warrant, but merely asked Judge Cannella to read the copy of the supporting affidavit in the Government's possession and to rule whether it established probable cause (Tr. 5-8). The United States Court of Appeals for the Fifth Circuit rejected Thompson's claim:

> "There was uncontradicted testimony at the hearing that a Louisiana district judge issued a warrant for the search, and this testimony was sufficient to establish the issuance of the warrant. Since the issuance of a warrant was effectively established, the burden of establishing that the search was illegal was on movant-defendant. Defendant, however, completely failed to sustain his burden of proving that the warrant was illegally issued or executed. De-

> fendant had access to public records where the warrant was filed; he could have introduced the document into evidence in order to prove that it was illegally issued or executed. He did not do so. In truth, defendant's only complaint is that the prosecution did not introduce the warrant into evidence. We are aware of no rule of procedure, evidence or law that requires the prosecution to introduce a search warrant into evidence under such circumstances as are presented here. . . ." *Id.* at 377 (citations omitted).

See also United States v. *Crane,* 445 F.2d 509, 519-20 (5th Cir. 1971).

POINT II

Rollins' arrest, and the search incident thereto, were proper even though the Government had not attempted to obtain an arrest warrant.

Rollins asserts that his arrest was invalid because of the failure of the Government to obtain an arrest warrant. He relies for this position upon the Ninth Circuit's 2-1 opinion in *United States* v. *Watson,* 504 F.2d 849 (9th Cir. 1974). That opinion expressly relies upon the following passage from *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 480-81:

> ". . . The case of *Warden* v. *Hayden, supra,* where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances. . . ."

In so relying, Rollins ignores the law in this Circuit regarding the ambit of the above quoted passage.

The simple answer to Rollins' contention that his arrest was invalid because an arrest warrant was not obtained is that, even assuming *arguendo* ample opportunity to obtain a warrant, an arrest warrant is not required to arrest a defendant during the daytime in a public place. There is no need to amplify upon this Court's holding in *United States* v. *Gonzalez,* 483 F.2d 223, 225 n. 2 (2d Cir. 1973), which is dispositive here:

> "A related issue was raised on oral argument, namely, whether an arrest warrant was required under the facts presented since there was ample time to obtain one . . . prior to his arrest. A nighttime warrantless arrest in a man's home, when there is ample time to obtain a warrant, may very well be unconstitutional. United States v. Mapp, 476 F.2d 67, 73-74 (2d Cir. 1973). *See also,* Coolidge v. New Hampshire, 403 U.S. 443, 480 (Stewart, J.), 492, 91 S. Ct. 2022, 29 L.Ed.2d 564 (Harlan, J., concurring) (1971); Jones v. United States, 357 U.S. 493, 499-500, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958). We believe, however, that the arrest here is governed by the general rule that 'a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony * * *.' Carroll v. United States, 267 U.S. 132, 156, 45 S.Ct. 280, 286, 69 L.Ed. 543 (1925). *See also,* Coolidge v. New Hampshire, supra, 403 U.S. at 511 n. 1, 91 S.Ct. 2022 (White, J., concurring and dissenting); Trupiano v. United States, 334 U.S. 699, 68 S. Ct. 1229, 92 L.Ed. 1663 (1948).
>
> "The Supreme Court in Coolidge and Jones was concerned with the arrest of a person in his own home and at a time (during the night) when he could expect privacy. . . ."

See United States v. *Fernandez,* 480 F.2d 726, 740 n. 20 (2d Cir. 1973); *United States* v. *Blair,* 366 F. Supp. 1036, 1039 and nn. 6-8 (S.D.N.Y. 1973). *See also Williams* v.

United States, 463 F.2d 1183 (2d Cir.), *cert. denied,* 409 U.S. 967 (1972).

Rollins' arrest having been valid, the search of his person incident to arrest was also valid. *United States* v. *Robinson,* 414 U.S. 218 (1973); *Gustafson* v. *Florida,* 414 U.S. 260 (1973).

POINT III

The Kenya Post Office Directory was authenticated properly.

The supplemental brief filed by assigned appellate counsel makes a tortured argument that it was error for the Kenya Post Office Directory, GX 10, to have been admitted into evidence. The purported basis of the argument is the authentication requirements for "foreign official records" contained in Rule 44(a)(2), Federal Rules of Civil Procedure, made applicable to criminal cases by Rule 27, Federal Rules of Criminal Procedure.

Assuming *arguendo* that the Directory is a "foreign official record," * there are two separate reasons why Rule

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* It is far from clear whether the Directory is a "foreign official record." The term "official record" has been defined as:

> ". . . work done by a person in the employment of the Government in the course of the performance of the duties of his position." *United States* v. *Aluminum Co. of America,* 1 F.R.D. 71, 75 (S.D.N.Y. 1939).

See 5 *Moore's Federal Practice* ¶ 44.02 at 44-22-23 (2d ed. 1974). The Directory bears on its cover the legend: "Issued by the Regional Director, East African Posts and Telecommunications Corporation, Kenya." The record is barren of any proof of the status of the East African Posts and Telecommunications Corporation. The trial testimony concerning the publisher of the Directory was simply that it is published by the Kenya Post Office authorities (Tr. 143). It is entirely possible that the Directory is not "official" in the sense that it is published by a governmental entity.

44 authorized the admission of this evidence. Rule 44(c) of the Federal Rules of Civil Procedure now provides:

> "This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law."

That provision superseded, effective July 1, 1966, the former Rule 44(c), which provided:

> "OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law."

5 *Moore's Federal Practice, supra,* ¶ 44.01[2] at 44-4, ¶ 44.01[5] at 44-10. The Committee Note to the 1966 amendment explains that the purpose of the revision was to ensure that "international agreements of the United States are unaffected by the rule. . . ." 5 *Moore's Federal Practice, supra,* ¶ 44.01[6] at 44-12. Rule 44(a)(2) is permissive, not mandatory, and an "official record" may still be authenticated, as at common law, by the direct testimony of a witness who knows what the record is, as was done below. *See, e.g., Beaty Shopping Center, Inc.* v. *Monarch Ins. Co. of Ohio,* 315 F.2d 467, 470 (4th Cir. 1963); *Brenci* v. *United States,* 175 F.2d 90, 93 (1st Cir. 1949); 5 *Moore's Federal Practice, supra,* ¶ 44.03 at 44-25; 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2437 at 396-97 (1971). *See also United States* v. *Ward,* 173 F.2d 628, 629 (2d Cir. 1949); *United States* v. *Locke,* 425 F.2d 313 (5th Cir. 1970); *United States* v. *Holmes,* 387 F.2d 781, 783-84 (7th Cir. 1967), *cert. denied,* 391 U.S. 936 (1968); *Pardo* v. *United States,* 369 F.2d 922, 925-26 (5th Cir. 1966).

In addition, the contention that the Directory was improperly admitted into evidence ignores the first clause of Rule 44(a)(2), which states:

> *"Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof. . . ."

The 1966 Committee Note explains:

> "Foreign official records may be proved, as heretofore, by means of official publications thereof. See *United States* v. *Aluminum Co. of America*, 1 FRD 71 (SDNY 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character." 5 *Moore's Federal Practice, supra*, ¶ 44.01[6] at 44-10.

Consequently, if the East African Posts and Telecommunications Corporation, which issued the Directory, is a governmental entity, the Government need not even have had Mr. Noronha identify the Directory, which would have been self-authenticating.

POINT IV

Rollins' claim that the evidence was insufficient to sustain his conviction is frivolous.

Rollins' *pro se* brief argues that the Government's proof was insufficient to establish mailing and Rollins' participation in and knowledge of the scheme to defraud by use of the mails. Of course, after conviction, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974). Rollins' argument is accordingly frivolous.

Mailing of the transfer forms, GXs 1A and 2A, was established in two ways. First, Portale testified that he received the transfer forms from his secretary, stapled to air mail envelopes, GXs 1B and 2B. Portale also testified that the practice of the Avenue B branch was for his secretary to open the mail left on her desk by the postman,

staple the envelope to its contents and deliver them to Portale. In *Stevens* v. *United States,* 306 F.2d 834 (5th Cir. 1962), the testimony was that mail sent to an insurance claim agent or the company he represented was placed in a post office box, where it was picked up by the agent's secretary who took it to the agent's office, opened it and placed it on the agent's desk. The Fifth Circuit held such testimony sufficient evidence that a letter placed on the agent's desk had been mailed.

> ". . . The showing of the customs, usages and practices in the course of business with evidence of the letter appearing in the customary channel of mail matter is enough to carry the question to the jury. The use of the mails may be established, like most other facts, by circumstantial evidence. . . ." *Id.* at 835-36.

This Court indicated in *United States* v. *Fassoulis,* 445 F.2d 13, 17 (2d Cir.), *cert. denied,* 404 U.S. 858 (1971), while holding other proof of mailing to have been sufficient, that it also would have considered the proof of mailing in *Stevens* v. *United States, supra,* to have been sufficient.

Second, the air mail envelopes, GXs 1B and 2B, were addressed to "The Manager, Manufacturers Hanover Trust Company, 37 Avenue B, New York, New York 10009, U.S.A.," affixed to the envelopes were cancelled Kenyan postage stamps and the envelopes were postmarked at Nairobi, Kenya. Slavinski testified that regular mail sent to the United States from abroad is delivered by the Postal Service, which does not place any markings on that mail. In sum, the physical evidence in this case was sufficient to justify the jury's findings that the transfer forms had been delivered by the United States Postal Service.

The evidence of Rollins' participation in and knowledge of the scheme to defraud was overwhelming. The Govern-

ment's proof of those elements included: Rollins, using a false name, opened a bank account in the name of a fictitious business enterprise; Rollins provided the name and number of that account and the name and address of the bank to the person who forged and mailed the transfer forms; Rollins applied repeated pressure to Meehan to speed the processing of the forged forms so that Rollins could be paid the proceeds before the forgeries were discovered; Rollins told bank officials he was receiving the money in payment for a wheat transaction accomplished through a fictitious entity, the "Wheat Marketing Board;" Rollins, when arrested, was in possession of the address, listed under a fictitious name, of a discharged employee of the Foreign Exchange Department of the Nairobi bank whose forms were forged, a person uniquely able and motivated to perpetrate the scheme involved in this case; and Rollins would have received more than $650,000 had the fraud succeeded. Further recitation of the proof of Rollins' participation in and knowledge of the scheme to defraud Manufacturers Hanover by the use of the United States mails would be superfluous.

POINT V

It was within Judge Cannella's discretion not to sequester Postal Inspector Slavinski.

Rollins claims Judge Cannella erred in not granting Rollins' motion to sequester Postal Inspector Slavinski who testified at the trial. The claim is devoid of merit.

As this Court stated in *United States* v. *Pellegrino*, 470 F.2d 1205, 1208 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973) (citations omitted):

> ". . . Since the chief investigating agent may be of significant help to the prosecution during the course of a trial, the trial court has discretion to make an exception to the general rule of sequestration of witnesses in his case."

See also United States v. *DeAngelis,* 490 F.2d 1004, 1009-10 (2d Cir.), *cert. denied,* 416 U.S. 956 (1974). *But see United States* v. *Nazzaro,* 472 F.2d 302, 313 n. 12 (2d Cir. 1973). In this case Slavinski's presence at the prosecution table was particularly necessary because Assistant United States Attorney Wile, who tried the case, was a last minute replacement for the Assistant originally assigned to the case, who had been recently hospitalized (Tr. 19; Transcript of pretrial conference, October 16, 1974, at 1-2).

While apparently conceding the trial court's discretion to exempt the chief investigating agent from an exclusion order, Rollins asserts that error was nevertheless committed because Slavinski was not required to testify as the first Government witness and the jury was not instructed by Judge Cannella that Slavinski had heard the prior testimony of other witnesses.

As to Rollins' first assertion, it should be noted that the F.B.I. agent in *United States* v. *Pellegrino, supra,* was the last Government witness. More importantly, however, Rollins' argument is premised on the notion that allowing Slavinski to remain in the courtroom presented the danger that he "shaped" his testimony. While in this case Slavinski corroborated, in some respects, the prior testimony of both Santaromita and Meehan, Rollins complains only of the corroboration of Meehan's testimony that, during a telephone conversation on September 6, 1974, Rollins, using the name "Cody," stated that the mail transfer forms were in payment for wheat that Rollins previously had shipped to Kenya. However, Meehan actually testified that Rollins made that particular statement during a telephone conversation on September 4, 1974, which was not overheard by Slavinski (Tr. 97). Meehan's testimony concerning the September 6, 1974 conversation did not mention any discussion of a wheat transaction (Tr. 99-100). Only Slavinski testified that, during the September 6, 1974 telephone conversation, Rollins stated that the mail transfer forms were payment for wheat that had already been shipped to Kenya (Tr. 115-16). Clearly

Slavinski did not "shape" his testimony to conform to Meehan's.

Rollins' second assertion, that the jury should have been instructed that Slavinski had heard prior testimony, similarly lacks substance. First, it had to be obvious to the jury that Slavinski had listened to the earlier testimony because Slavinski was in plain view of the jury during such testimony. Second, Rollins never requested such an instruction. And third, the point that Slavinski had listened to the testimony of Santaromita and Meehan was made clear to the jury both during cross-examination and summation (Tr. 128-29, 285-87). To have instructed the jury as to a fact that was both manifest and undisputed would have served no purpose whatsoever. No error was committed.

POINT VI

Judge Cannella properly intervened during the trial only to clarify testimony and assist the jury.

While the trial judge may not assume the prosecutor's role in questioning witnesses, he is nevertheless more than merely a moderator and has the affirmative duty to ensure that a trial is conducted fairly and the issues presented clearly. *United States* v. *Fernandez, supra,* 480 F.2d at 73538; *United States* v. *Curcio,* 279 F.2d 681, 682 (2d Cir.), *cert. denied,* 364 U.S. 824 (1960); *United States* v. *Brandt,* 196 F.2d 653, 655 (2d Cir. 1952). This Court has repeatedly held that a trial judge "should take an active part when necessary to clarify testimony and assist the jury in understanding the evidence." *United States* v. *Tyminski,* 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied,* 397 U.S. 1075 (1970); *United States* v. *Cruz,* 455 F.2d 184, 185 (2d Cir.), *cert. denied,* 406 U.S. 918 (1972); *United States* v. *Switzer,* 252 F.2d 139, 144 (2d Cir.), *cert. denied,* 357 U.S. 922 (1958). Of course, the trial judge may not, by the nature or number of his questions, convey to the jury a belief

as to the defendant's guilt or innocence. *United States* v. *Cuevas,* 510 F.2d 848, 850 (2d Cir. 1975); *United States* v. *McCord,* 509 F.2d 334, 347-48 (D.C. Cir. 1974) (*en banc*). *Cf. United States* v. *Fernandez, supra; United States* v. *Nazzaro, supra,* 472 F.2d at 307; *United States* v. *Guglielmini,* 384 F.2d 602, 605 (2d Cir. 1967). In this case it is not claimed that, by his actions, Judge Cannella evidenced a belief in Rollins' guilt. His limited intervention in the trial below, we submit, was entirely proper.

Rollins points to three incidents in support of his contention that Judge Cannella usurped the role of the prosecutor: the testimony of Meehan concerning the practice of the Avenue B branch with respect to incoming mail (Tr. 55-57); the testimony of Lewis concerning her familiarity with Rollins when he was living under the name "Lee Evans" (Tr. 186-87); and the introduction through Hunvald of the photograph of Rollins from the file of the University of Missouri School of Law (Tr. 176-77). An objective review of those three incidents reveals that Judge Cannella's actions were motivated by the desire that the jury receive a clear and complete presentation of the testimony and did not have an unfair impact on the trial.

With respect to Meehan's testimony, Judge Cannella first interceded as a result of an objection by Mr. Panzer to the testimony as to custom and usage. Judge Cannella clarified that Meehan did not personally receive the transfer forms from the postman and ruled the testimony as to custom admissible. Then Judge Cannella reframed a question posed by Assistant United States Attorney Wile so as to elicit from Meehan the practice of the Avenue B branch in August, 1974, when the transfer forms were received, rather than at the time of trial, approximately two months later. Finally, Judge Cannella elicited from Meehan that the envelopes had been opened and the contents removed when Meehan received them, again testimony favorable to the defense on the issue of mailing.

With respect to Lewis' testimony, Judge Cannella's questions clarified for the jury the firm basis for Lewis' in-court identification of Rollins as the man she knew as "Lee Evans." * However, that foundation for her testimony was superfluous beyond any doubt once Lewis spontaneously identified correctly a female spectator in the courtroom as Deborah Miles, who also was living with Rollins in Oakland, California in 1971 (Tr. 181-82).

The third incident involved Judge Cannella's introduction into evidence of the photograph of Rollins from his law school file. Before Judge Cannella raised the question of the photograph Rollins was identified in court by Professor Hunvald who testified that he interviewed Rollins when he applied to law school, that Rollins had been a student in one of Hunvald's courses, that Rollins was a research assistant for Hunvald and that Hunvald represented Rollins in a legal matter. The Government, able to prove Rollins' true identity by fingerprints, handwriting, a passport photograph and in-court identification, obviously did not need the additional proof of the law school photograph. Just as obviously Rollins was not eager for the jury to receive another uncontrovertible item of evidence as to his true identity. Judge Cannella's only possible motive in placing the photograph before the jury was to ensure the clear and complete presentation of Hunvald's testimony.

This case well illustrates the accuracy of this Court's observation in *United States* v. *Nazzaro, supra,* 472 F.2d at 303:

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* Judge Cannella did not know that Sigrid Lewis was the widow of Isaac Lewis, whose murder had resulted in the issuance of the search warrant for Rollins' apartment in Oakland, California. Assistant United States Attorney Wile did not ask the questions posed by Judge Cannella, which ordinarily would have been asked of any witness making an identification of a person she had not seen for three years, for fear of a response that might have required a mistrial.

> "Rarely is there a case reaching us after conviction in which the defendant believes he has received a fair trial. The human tendency to blame a trial judge for the jury's verdict of guilt is a frailty we often encounter, and almost as frequently we find such claims to be without merit or substance. . . ."

POINT VII

Judge Cannella's instructions to the jury were completely proper.

Rollins claims Judge Cannella erred in his instructions to the jury concerning aiding and abetting and the Government's burden of proof of criminal intent. That claim is unfathomable in view of merely a reading of what Judge Cannella said. Furthermore, the failure to except below on the grounds now asserted precludes appellate review. *United States* v. *Pinto,* 503 F.2d 718, 723-24 (2d Cir. 1974).

With respect to aiding and abetting, Judge Cannella first summarized Title 18, United States Code, Section 2 and explained its legal significance (Tr. 334). Subsequently, Judge Cannella instructed the jury:

> ". . . it is not necessary that the defendant personally did every act as charged. While there is no precise rule as to what constitutes aiding and abetting, it is enough that a defendant in some manner associated himself with the illegal venture, that he participated in it as something he wished to bring about, and that he seeks by his actions to help it succeed. One who aids and abets another in the commission of the crime is equally guilty with the person who actually physically committed it. . . ." Tr. 339-40.

Judge Cannella's instruction is virtually identical to the instruction approved by this Court in *United States* v. *Umans,* 368 F.2d 725, 728 (2d Cir. 1966), *cert. dismissed as improvidently granted,* 389 U.S. 80 (1967). *See United States* v. *Peoni,* 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, C.J.).

With respect to criminal intent Judge Cannella said:

> "There are three of them which I will discuss together, and they are the words 'unlawful,' 'knowing,' and 'willful.' Actually, as the defendant indicated to you, this is the nub of the case, because unless he did act in a fashion which was unlawful, knowing, and willful, he is not guilty of any of these charges.
>
> ". . . The second word is 'knowing.' Our whole system of government as far as the criminal law is concerned is based upon the concept of knowing and willful. It is because we have willful [sic] and the ability to act or not to act and we exercise that judgment that if we exercise it in a proscribed manner, where Congress has said you cannot do that, then you are violating the law. But you must do it willfully. You must have a choice and you must exercise the choice.
>
> " 'Knowing' means to do something voluntarily and freely, not through mistake, inadvertence or in good faith. That is what the word means in this context. 'Willfully' adds to that a further concept. The Romans called it the mens rea, the evil mind, the bad motive, the bad intention. A criminal act. So he has to act in this fashion before you may find him guilty of any of these charges." Tr. 331-32.

Judge Cannella further advised the jury:

> "The last item the Government has to prove is that the defendant acted unlawfully, willfully and knowingly. I have just defined that term for you

and you know what that means. Very briefly, it means he acted freely and voluntarily, knowing that he was doing something wrong, not in good faith, not by inadvertence, not by mistake, but that he had an evil intent to commit the purpose, the purpose here being very clear, to get this $650,000 from these Nairobi banks, and which were frauds. They in fact did not represent real bank documents; they were fraudulent documents. And therefore one of the banks, and probably the Manufacturers, would have lost that money, and whoever got the money would have gained it.

"This is the nub of the case, as I told you before; and as the defendant himself has indicated to you, he denies that he had anything to do with this that was wrong, illegal or unlawful. You have heard his position on that. You have also heard the government's position on that, that it is incredible from the chain of events and from the totality of circumstantial evidence which corroborate the happening of this crime that he in fact did not commit it unlawfully.

"You will have to consider all the evidence in this case. You will have to consider the argument of both sides. You will have to make a judgment of your own based upon your conscience. And if you find that the government has proven each one of these elements beyond a reasonable doubt, you should convict the defendant. On the other hand, if you find that the government has failed to prove any one or more or all of the elements concerned in these two counts, then it is your obligation to acquit the defendant." Tr. 337-38.

Since Judge Cannella had already told the jury that a reasonable doubt "can arise from the evidence that is pro-

duced or from the lack of evidence" (Tr. 320), it is impossible to discern any basis for Rollins' claim that the instructions to the jury were inadequate.*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD WILE,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

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* At the conclusion of Judge Cannella's instructions Mr. Panzer, on Rollins' behalf, requested that the jury be advised "that reasonable doubt could arise from a lack of evidence" (Tr. 345). Judge Cannella accurately responded that such an instruction already had been given (*id.*).

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Olga C. Grampp being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd. day of May, 1975 she served a copy of the within Brief, on 2. by placing the same in a properly postpaid franked envelope addressed: James H. Rollins a/k/a/ Lee Evans
C.H. J. 1225 Fallen Street.
Oakland, California. 94612

E. Thomas Boyle, Esq.
The Legal Aid Society . (Federal Defender Services Unit
509 U. S. Courthouse , Foley Square , N. Y. N. Y. 10007

And deponent further says that s he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Olga C. Grampp

Sworn to before me this

23rs. day of May, 1975

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977